WONG LAN & ANOR

v

EMAS-JAYA ENTERPRISE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
DATO' KAMALANATHAN RATNAM JC
[COMPANIES (WINDING-UP) NO: D5-28-10-1995]
24 JUNE 1996

CIVIL PROCEDURE: *Res judicata – Conditions for application of doctrine – Adjudication – Whether discontinued civil suit constitutes adjudication – Whether winding-up petition precluded – Whether subject matter of civil suit similar to subject matter of petition*

CIVIL PROCEDURE: *Res judicata – Estoppel – Estoppel per rem – Cause of action estoppel – Issue estoppel – Whether estoppel must be pleaded distinctly – Whether applicable where there is continuous violation of statutory provisions*

CIVIL PROCEDURE: *Stay of proceedings – Courts of Judicature Act 1964, s 44 – Approach to be adopted - Whether appeal is rendered nugatory if no stay granted*

COMPANY LAW: *Winding-up – Petition – Delay in presenting – Whether inordinate*

COMPANY LAW: *Winding-up – Petition – Whether petition must specifically refer to provision under which it was presented – Companies (Winding Up) Rules l972, r 8(l) and Form 2*

COMPANY LAW: *Winding-up – Petition – Companies Act 1965, s 218 – Procedure to be followed – Companies (Winding Up) Rules 1972*

COMPANY LAW: *Winding-up – Petition – Companies Act 1965, s 181 – Procedure to be followed – Rules of the High Court 1980*

COMPANY LAW: *Winding-up – Petition – Failure to specify provision under which petition presented – Whether petition rendered a hybrid petition – Use of word 'oppression' in petition – Whether a hybrid petition*

COMPANY LAW: *Winding-up – Stay of proceedings – Application subsequent to making of winding-up order – Companies Act 1965, s 243 – Who should apply – Whether stay should be granted – Guidelines*

The petitioners who are shareholders of the respondent company ('the respondent') had petitioned for the winding-up of the respondent under s 218(l)(f) and/or (i) of the Companies Act 1965 ('the CA'). They alleged

that the opposing parties had committed illegal and wrongful acts which justified the petition being made.

The petitioners, in their capacity as directors of another company ('PEJ'), had agreed to allow the respondent to substitute PEJ in respect of a contract for a project awarded to PEJ by the Lembaga Kemajuan Negeri Pahang ('the LKNP'). Pursuant to this, the paid-up capital of the respondent was increased, shares were apportioned, and shareholders were made directors. Consequently, the petitioners contended that there was a tacit agreement between all parties that the petitioners would have 30% participation in the respondent. The opposing parties denied this but admitted that the principal objective of the respondent thenceforth was to undertake the said project, and that this was the reason for the change of directors and shareholders.

The petitioners complained that they were not furnished with the details of the respondent's business involvement. That in response to their written enquiries, mere unaudited accounts were supplied. The petitioners claimed that as this was not disputed by any documentary evidence, there was, indeed, an omission to disclose relevant information.

It was also claimed that the unaudited accounts contained false transactions; that no audited accounts were filed with the Registrar of Companies ('the ROC), and that the unaudited accounts were materially different from the previous accounts filed with the ROC. Consequently, the petitioners submitted that the directors were in breach of art 97 of the respondent's Articles of Association ('the AA') which required directors to keep proper records of the accounts.

Article 111(l)(c) of the AA was also referred to, and this required the notice of every general meeting to be given to an auditor. Further, s 169(4) of the CA requires accounts to be duly audited before an annual general meeting and, by virtue of s 172(2) of the CA, a company must appoint an auditor at each annual general meeting. Based on this, the petitioners submitted that the appointment of an auditor was mandatory, but was not complied with. The audited accounts were also not filed, which was contrary to s 169(l) of the CA.

Reliance was also placed on s 15(2) of the CA read together with arts 2A(a) and 23 of the AA which collectively allow the directors to approve or refuse the registration of a transfer of shares. It was contended that the transfer of shares by one of the directors to a non-member was in breach of these provisions as no resolution of the board was obtained.

The appointment of a secretary was also said to be wrong due to the failure to obtain approval as necessary under s 139(3) of the CA and art 95 of the AA. Further, the petitioners also claimed that the minutes to the board of

directors' meeting was incomplete as reflected by the failure to include the objection raised by the petitioners against the appointment of the secretary.

The next issue raised was in regard to the intention to pass a special resolution to increase the share capital. It was submitted that none of the pre-conditions for the calling of the rights issue was made available to the petitioners, and that this was done to prevent a proper assessment from being made.

Another issue raised by the petitioners was that the purchase of some land for the project was not done with the approval of the shareholders. As the land was the only asset of the company, it was a substantial asset and, hence, a special resolution was necessary pursuant to s 132C(l)(a) of the CA.

The petitioners also alleged that the director responsible for filing the annual returns was guilty of an offence under s 364(2) of the CA for filing records containing false statements.

Finally, the petitioners claimed that as no reasons were given for their removal as directors, there was a breach of natural justice.

The respondent's main argument was that s. 218(l) of the CA allows for a winding-up order to be made if the Court opines that it is just and equitable to do so, whereas s. 181 of the CA can properly be invoked by a member for the winding-up order on the the grounds of oppression. Further to this, it was claimed that as the petitioners did not specifically state under which section they were proceeding, the present case was a hybrid petition purporting to have been presented under two different sections of the CA and therefore, the petition should be dismissed following *Lai Kim Loi v Datin Lai Fook Kim & Anor and another application*. It was submitted that the proper course would have been to bring two petitions.

The respondent also contended that as there was an inordinate delay of six years from the date of the contract to with the LKNP, the petitioners were deemed to have acquiesced into the conduct complained of.

Further, the respondents, relying strongly on *Re Sin Lee Sang Sawmill Sdn. Bhd*, submitted that the motive behind this petition was to obtain money from the respondent and to teach the past and present directors a lesson. In that case, a petition was refused on these grounds.

With regards the rights issue, the respondent claimed that the petitioners had the opportunity to take up the shares but they chose not to do so. The amendment of the MA, meanwhile, was claimed to have been done in accordance with clause 38 of the MA. As for the removal of the petitioners as directors, the respondent claimed that this was done pursuant to art 69 of the AA.

As regards oppression, the respondent submitted that it is for the petitioners to identify and prove the same and that the mere fact that a decision made is not agreeable with the petitioners does not amount to oppression.

Finally the respondent also raised the plea of *res judicata*. The petitioners had earlier initiated a civil action against the respondent company and a few of the opposing parties. Subsequently, however, the claim was discontinued, and the Court order denied the petitioners the right to file afresh. Therefore, the respondent claimed that, as the subject matter of the present petition was the same as that of the earlier civil suit, the petitioners are were *estopped* from raising the same allegations.

In the result, as a consequence of this instant Court's decision ordering the winding-up of the respondent, a notice of motion for a stay of execution on this order and for a stay of the winding-up proceedings pending the outcome of an appeal to the Court of Appeal was filed by the respondent. It was submitted that the Court, notwithstanding s 221 of the CA had jurisdiction to grant an order for a stay of execution, and that under s 73 of the Courts of Judicature Act 1964 ('the CJA') this Court had the discretion to grant a stay. It was submitted that there was no need to show any special circumstances to warrant a stay as the paramount consideration in an application for a stay under s 44(1) of the CA is that an appeal, if successful, should not be rendered nugatory.

The petitioners, meanwhile, objected to the application for a stay on the grounds that there was no provision in the law to allow a stay of execution of a Court order winding-up a company. Further, it was claimed that as no leave to appeal to the Court of Appeal was obtained yet, the application for a stay was premature.

Held:

[1] It is not a mandatory requirement to precisely refer to the specific section under which a petition is presented. Rule 8(l) of the Companies (Winding-Up) Rules 1972 ('the Rules') and Form 2 are silent as to any such requirement.

[2)] The facts of *Lai Kim Loi* can be distinguished from the present set of facts. There, the petition prayed for an order that at the company be wound up "under ss 181 or 218 of the CA". Here, the petition prayed for a winding-up order under the provisions of the CA.

[3] Where a petition is presented under s 181 of the CA, the procedure to be followed is found in the Rules of the High Court 1980 ('the RHC'). Whereas, a petition under s 218 of the CA requires compliance with the Rules. Although this petition did not specify the precise section under which it was presented, the procedure that had been followed from the

beginning was in accordance with the Rules. Thus, this petition was grounded on s 218 and not s 181 of the CA.

[4] The various complaints levelled against the respondent showed that the directors had acted in their own interests rather than in the interests of the members as a whole. Thus, a case under s 218(1)(f) of the CA had been made out, ie, there was oppressive behaviour as envisaged in s 181 of the CA.

[5] The mere use of the words "oppressive behaviour" in the petition did not transform it into a hybrid petition.

[6] Whether there is an inordinate delay or not is a question of fact. Time is not the sole criterion. In the present case, the petition was filed within one and a half months of the discontinuance of the civil suit and this did not amount to an inordinate delay.

[7] After the signing of the contract between the respondent and the LKNP, the petitioners were excluded from active management. Further, they were subsequently removed as directors and hence, were completely unaware of what the respondent was doing. Therefore, the petitioners could not be said to have acquiesced to conduct which they had no knowledge of.

[8] The respondent had not furnished the petitioners with enough details to decide whether to take up the rights issue or not. It would be inconceivable to expect the petitioners to exercise their rights when they were not given any basis to do so. The omission of the opposing parties to provide the petitioners with the relevant information was to further prevent them from participating in the affairs of the respondent.

[9] The resolution to increase the share capital was claimed to be *bona fide* and for the benefit of the respondent as a whole. However, no reason was offered by the respondent as to why the increase was necessary.

[10] In *Kumagai-Guni*, the Court held that a fully-paid shareholder, when petitioning for a compulsory winding-up, must show a *prima facie* probability that there would be assets available for distribution. In that case, however, the petition claimed that the respondent company was insolvent. In the present case, the petitioners were not asking for any debts nor were they alleging insolvency.

[11] When a matter has been adjudicated by a competent Court, the parties are not allowed to relitigate the *res judicata*. In such circumstances, the Court has an inherent discretion to dismiss the action even if the plea of *res judicata* was not raised. Here, there was no adjudication

as the civil suit was discontinued. Moreover, the subject matter of the civil suit was totally different from the relief sought in this petition.

[12] The provision that allows the Court to make an order staying the proceedings after an order for a winding-up has been made is s 243 of the CA. The prerequisites to granting a stay under s 243 of the CA are that the application must be by a liquidator, creditor, or contributory, and that there must be proof that all proceedings in relation to the winding-up should be stayed.

[13] The granting of a stay under s 243 of the CA is discretionary and the *onus* to make out a sufficient case is on the party seeking the stay. The attitude of the creditors, contributories, and the liquidator is relevant. In exercising its discretion, the Court should not only consider the interests of the creditors but also the issue of commercial morality and the interests of the public. A stay should be refused if there is evidence of misfeasance or of irregularities. These considerations are not exhaustive.

[14] Section 73 of the CJA which is *in pari materia* to r 13 of the Rules of the Court of Appeal 1994 provides that unless the Court so orders, an appeal does not operate as a stay. Section 44(l) of the CJA should be read together with s 73 of the CJA.

Obiter dicta:

[1] When a plea of *res judicata* is successfully invoked, there arises what is known as an *estoppel per rem*, of which there are two kinds. Firstly, the 'cause of action estoppel' which prevents the same cause of action from being asserted again. Secondly, the 'issue estoppel' which prevents the contradiction of the correctness of a final judgment.

[2] Estoppel, unlike *res judicata*, has to be pleaded distinctly.

[3] Whenever an application for an interim order under s 43 of the CJA may be made either to the High Court or to the Court of Appeal, it shall be made in the first instance to the High Court.

[4] Despite the rather wide words of s 221(1) of the CA, the only final order that may be made is either to direct a winding-up or to dismiss the petition. Certain interim orders may also be made but no order distributing the assets of a company may be made.

[Petitioners' prayers allowed; respondent's application for a stay dismissed.]

Cases referred to:

Lai Kim Loi v Dato' Lai Fook Kim & Anor [1989] 2 MLJ 290 ***(refd)***

Kumagai-Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application [1994] 2 MLJ 789 ***(refd)***

Re Senson Auto Supplies Sdn Bhd [1988] 1 MLJ 326 ***(refd)***
Re Sin Lee Sang Sawmill Sdn Bhd [1990] 1 MLJ 250 ***(refd)***
Re Kong Thai Sawmill (Miri) Sdn Bhd [1978] 2 MLJ 227 ***(refd)***
Ganeswary d/o Ponnudurai v Prismatic Sdn Bhd [1994] 4 CLJ 671 ***(refd)***
Re Senson Auto Supplies Sdn Bhd [1988] 1 MLJ 290 ***(refd)***
Sidebottom v Kershaw, Leese & Company, Limited CA [1920] 1 Ch 154 ***(refd)***
Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 SC ***(refd)***
Mensa Mercantile (Far East) Pte Ltd v Eikobina (M) Sdn Bhd [1991] 2 MLJ 258 ***(refd)***
Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119, 113 SC ***(refd)***
Lee Suat Hong v Teo Lye [1988] 2 MLJ 537 CA ***(refd)***
See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 CA ***(refd)***
Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors [1995] 2 MLJ FC 709 ***(refd)***
Krextile Holdings Pty Ltd v Widdows [1974] VR 689 ***(refd)***
All Persons in Occupation of the House (partly wooden and partly cemented) and the Wooden Stores Erected on a Portion of Land held under Grant NO: 16977 For Lot 4271 in the Township of Johor Bharu, Johor v Punca Klasik Sdn Bhd [1996] 2 AMR 1855, 1860 ***(refd)***
Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105 FC ***(refd)***
Kerajaan Malaysia v Dato' Hj Ghani Gilong [1995] 2 MLJ 119 FC ***(refd)***

Legislation referred to:
Companies Act 1965, ss 15(2), 44, 132C(1)(a), 139(3), 165, 167, 169(1), (4), 172(2), 181, 218, 218(1)(f)(i), 221, 364(2).
Companies (Consolidation) Act 1908 [UK], s 13.
Courts of Judicature Act 1964, ss 44(1), 73.
Companies (Winding-Up) Rules 1972, rr 24, 32.
Rules of the Court of Appeal 1994, r 13.
Rules of the High Court 1980, O 88 r 7.

For the petitioners - Lee Lim Huat (SK Yap with him) M/s SK Yap & Ku Azrina
For the respondents - BS Sidhu (Sharon Sidhu with him); M/s BS Sidhu & Co

JUDGMENT

Kamalanathan Ratnam JC:

This is a petition for the winding-up of the respondent under s. 218(1)(f) and/or (i) of the Companies Act 1965 (the Act). The said section reads:

> 218. Circumstances in which company may be wound up by Court
>
> (1) The Court may order the winding-up if–
>
> ...
>
> (f) the directors have acted in the affairs of the company in their own interests rather than in the interest of the members as a whole, or in

any other manner whatsoever which appears to be unfair or unjust to other members;

...

(i) the Court is of opinion that it is just and equitable that the company be wound up;

Facts Leading to the Presentation

The petitioners are two of the shareholders of the respondent and contend that one Lim Sue Beng (LSB) and Lim Bee Ling (LBL), being shareholders and former directors of the respondent (hereinafter referred to as the "opposing shareholders") and the current directors, Lim Cheng Pow (LCP), Low Siew Hoong (LSH), Lim Soo Hock (LSH) and Lim Bee Khim (LBK) (hereinafter referred to as the "opposing directors") had committed illegal and wrongful acts to warrant a winding-up under the above referred subsections. Where relevant the opposing shareholders and the opposing directors are collectively referred to as the "opposing parties".

The respondent was incorporated on 31 July 1980. The petitioners were among the first shareholders and directors of the respondent since its incorporation and until 1988, the paid-up share capital of the respondent was only RM4. The principal nature of the business carried on by the respondent was trading in electronics and chemical products. Until 1987 proper accounts had been kept by the respondent and audited accounts filed with the Registrar of Companies (ROC). At all material times the petitioners were also directors of another company called Pembinaan Emas-Jaya Sdn. Bhd. (PEJ) which had been awarded a contract by Lembaga Kemajuan Negeri Pahang (LKNP) (hereinafter referred to as the "said project"). The petitioners sought the assistance of LCP and his son LSB to furnish the working capital for the said project on condition that the petitioners cause LKNP to execute the formal agreement for the said project with the respondents instead of with PEJ.

The said agreement (hereinafter referred to as the "1988 agreement") was signed on 15 December 1988 and pursuant to the 1988 agreement the paid up capital of the respondent was increased from RM4 to RM100,000 and the shares were apportioned as follows:

LSB (LCP's son)	30%
LBL (LCP's daughter)	30%
Lim Teik Mei (LTM)	10%
The 1st petitioner	15%
The 2nd petitioner	15%

All the shareholders also became directors of the respondent. The petitioners then arranged for the Joint Venture Agreement (JVA) between LKNP and the respondent to be executed on 29 December 1988 and the signatories for the respondent on the JVA were the petitioners themselves.

The Petitioners' Complaints

(1) 30% Say in the Management of the Business

The petitioners contend that in consideration of LCP financing the said project, the petitioners caused LKNP to sign the JVA in respect of the said project with the respondent instead of with PEJ and that it was the common intention and shared assumption between LCP and the other new shareholders as at 15 December 1988 (i.e. LSB, LBL and LTM) and the petitioners that the petitioners would have 30% decision-making participation in the respondent as was mutually and verbally agreed upon and that such an agreement seemed implicit due to the fact that the petitioners continued to remain as directors of the respondent. Whilst the opposing parties had denied the financing arrangement and the ratio of participation as contended by' the petitioners they expressly admit the fact that with effect from 15 December 1988 the principal object of the respondent was to undertake the said project and the change of directors and shareholders was done in furtherance of the said project. It was also submitted by the petitioners that the respondent's Form 24 (Return of Allotment of Shares) and the Form 49 (Return Giving Particulars in Register of Directors, Managers and Secretaries and Changes of Particulars) both dated 15 December 1988 exhibits annexed to the petition, confirm the above.

(2) Petitioners Not Kept Informed of Respondent's Business

The next complaint of the petitioners is that they were not kept informed of the business of the respondent and on 17 June 1993 wrote to the respondent (exhibit P-10 to the petition) enquiring:

(1) the amount that has been injected into the company to date.

(2) the total expenses incurred to date, including office overhead costs, monthly wages, plan fees, design fees and any other expenses in relation to the project.

(3) of other businesses or projects that the company had participated in.

In response LCP furnished the petitioners with copies of unaudited accounts prepared by him on behalf of the company for the period commencing 15 December 1988 to 30 September 1993 and denied that the petitioners were not kept informed. Since no documentary evidence had been disclosed by the opposing parties to contradict the petitioners' claim the petitioners maintain that

there has been a failure to disclose by the respondent, thereby resulting in a loss of confidence by the petitioners over those responsible for the conduct of the respondent's business.

(3) Incomplete Untrue and False Accounts Furnished by LCP on Behalf of the Respondent

The petitioners contend that although LSB had signed all the annual returns of the respondent for the calendar years 1988, 1989, 1990, 1991 and 1992 informing the ROC that the annual general meetings had been held on 15 December of each year, no audited accounts of the respondent had ever been filed for the five years and which fact the opposing parties had admitted to. The said unaudited accounts disclose that:

(a) LCP had given various loans to the respondent on various dates at 12% pa interest to be capitalised.

(b) The respondent incurred various very large sums of unidentified and unaccounted for expenses.

I was referred to Articles 97 and 111(1)(c) of the respondent's articles of association and ss 169(4) and 172(2) of the Act. Article 97 of the respondent's articles provides that "The directors shall cause proper accounting and other records **to be kept and shall distribute** (Emphasis provided) copies of balance sheets and other documents as required by the Act and shall from time to time determine whether and to what extent and at what times and places, and under what conditions and regulations the accounting and other records of the company or any of them shall be open to the inspection of members not being directors and no member (not being a director) shall have any right of inspecting any account or book or paper of the company except as conferred by statute or authorised by the directors or by the company in general meeting."

It was submitted that it was the duty of the opposing parties who were directors of the respondent to keep proper accounts and that the petitioners as directors therefore are entitled to access thereto. Article 111(1)(c) of the respondent's articles provides that notice of every general meeting shall be given, *inter alia*, to the auditor for the time being of the respondent and on this basis it was submitted that the respondent should have an auditor for each year who is entitled to receive notice of any general meeting including the annual general meeting.

Section 169(4) of the Act provides that the profit and loss account, and the balance sheet of a company **shall be duly audited before they are laid before the company at its annual general meeting** (Emphasis provided) and s 172(2) of the Act provides that a company shall at each annual general meeting appoint a person or persons to be the auditor or auditors of the company and any auditor or auditors so appointed, shall subject to that section,

hold office until the conclusion of the next annual general meeting of the company. It was the petitioners' contention that based upon the above referred section it was mandatory for the respondent to appoint auditors and that its accounts must be distributed to the shareholders before each annual general meeting and upon approval thereof, and in accordance with s 169(1) of the Act such audited and approved accounts shall be filed with the ROC.

The petitioners referred me to exhibit P-9 annexed to the petition, ie the agreement between LKNP and the respondent wherein the respondent, describing itself as the developer of the project, agreed to pay LKNP a sum of RM1,989,175 being the land cost in a lump sum within one year from the date of signing the agreement and whereby it was agreed between the parties that the said agreement would then be construed as a sales and purchase agreement. The petitioners questioned the source of the respondent's funding, since the paid-up capital of the respondent was only RM100,000 at all material times. Another feature pointed out to me was that contrary to the audited accounts of the respondent as at 31 July 1987 and filed with the ROC which showed the respondent's current liabilities at RM51,157 for the year 1986 and RM22,832 for the year 1987, the unaudited accounts of the respondent furnished by LCP and not filed with the ROC showed that the respondent was indebted to LCP in the sum of RM56,427.40 as at December 1986 and RM56,822.83 as at December 1987.

(4) Unlawful Transfer of Shares and Appointment of Respondent's Secretary

Some time in late September 1993, LTM transferred his equity of 10% in the respondent to LSK who is the son of LCP without the prior approval of the respondent's board of directors and contrary to the articles of association thereof. The petitioners argued that in tandem with the provision of s 15(2) of the Act, articles 2A(a) and 23 of the respondent's articles of association give the board of directors the discretion without assigning any reason thereof, either to approve or refuse the registration of the transfer of the respondent's shares to any person. In the case of the transfer of the shares from LTM to LSK, **who was not a member of the respondent then** (Emphasis provided), the registration was effected by the opposing parties without any resolution of the board because the petitioners were members of the board then.

It was also submitted by the petitioners that the appointment of one Lim Guat Yeang (LGY) by the opposing parties to be the secretary of the respondent was improper. I was referred to s 139(3) of the Act which reads:

> (3) The secretary or secretaries shall be appointed by the directors and at least one of those secretaries shall be present at the registered office of the company by himself or his agent or clerk on the days and at the hours during which the registered office Is to be accessible to the public.

I was also referred to article 95 of the respondent's articles of association which specifically gives the power to appoint the secretary to the board of directors and not to the majority shareholders as contended by the opposing parties.

(5) Improper and Incomplete Minutes of Board of Directors Meetings

On 1 December 1993 the petitioners received a notice of a board of directors meeting to be held on 7 December 1993. The petitioners attended the said meeting and objected to the appointment of the company secretary but these objections were not recorded in the minutes. However, the minutes exhibited as P-16 to the petition was in any event an unsigned and undated copy of the minutes. The petitioners attended another board meeting on 17 March 1994 and again objected to the minutes of the board meeting on 7 December 1993 and also to the appointment of the secretary. The minutes of the subsequent meeting did not reflect the objections.

(6) The Second EGM, inter alia, to Increase the Authorised Share Capital of the Respondent, to Declare a Rights Issue and to Remove All the Existing Directors

The agenda to the notice of the EGM of the respondent to be held on 16 April 1994 (the second EGM) was to consider and pass special resolutions to increase the share capital and to amend clause 5 of the Memorandum of Association. The respondent intended to hold the second EGM to consider and pass the same resolutions as those in the agenda for the first EGM. Firstly, the second MGM sought to increase a rights issue of shares. This clearly was indicative of cash-flow problems, thus requiring additional capital from its existing shareholders. In such an event the existing shareholders ought to be fully informed of the audited accounts to enable them to make a proper assessment of their further investment. It was submitted that none of the prerequisites for the calling of the rights issue was made available to the petitioners. The omission, it was suggested, was deliberate and intended to have the effect of discouraging the petitioners from subscribing to the rights issue, thus diluting their holding in the respondent. The petitioners indeed did not submit to the rights issue. In any event no audited accounts were given to them by the opposing shareholders. The opposing parties justified their conduct by stating that this was for the benefit of the respondent and done pursuant to the articles of association.

Secondly, it was submitted that the second EGM sought to remove the petitioners and the two opposing shareholders (the children of LCP) as directors of the respondent and to appoint four others (LCP, his wife and 2 of his children) as the new directors.

Thirdly, the notice for the second EGM stated specifically that two items, namely, the increase in the authorised capital and the amendment to clause 5

of the memorandum of association would be considered and if thought fit, to be passed by "special resolutions" (ie requiring 75% of the votes pursuant to s 152(1) of the Act). Since the petitioners were jointly holding 30% the opposing shareholders then and there, during the second MGM, arbitrarily amended the special resolutions to ordinary resolutions despite what was represented in the notice and proceeded to pass the said ordinary resolutions which required only a majority vote of 51%.

(7) Alleged Violation of Statutory Provisions by the Opposing Parties

It was contended by the petitioners that there had been a breach of s 132C(1)(a) of the Act which reads as follows:

> (1) Notwithstanding anything in a company's memorandum or articles, the directors shall not carry into effect any proposal or execute any transaction for -
>
> (a) the acquisition of an undertaking or property of a substantial value; or
>
> ...
>
> which would materially and adversely affect the performance or financial position of the company unless the proposal or transaction has been approved by the company in general meeting.

The intent and purpose of the said section is clear in that a shareholders' resolution is required when a limited company purchased substantial assets. However in the present case notwithstanding the aforesaid statutory requirement no resolution by the shareholders of the respondent had been passed for the purchase of the land in respect of the said project, and since the land in question is the only asset of the respondent, it is obvious that it is a substantial asset within the meaning of s 132C(1)(a) of the Act.

LSB, one of the opposing shareholders and a director of the respondent at the material time had filed the annual returns on behalf of the respondent for five (5) consecutive years, ie from 1988 to 1992 that "the respondent has not commenced business". However this is denied in Encl 9 para 28 of the opposing parties when they said:

> ... we verily state that the Respondent company did not falsely represent in its Annual Returns for the year ended December 1988 until December 1992 that "The Company has not commenced business ...".

It was submitted that this was a clear manifest denial under oath of what was stated in the annual returns and demonstrated an offence under s 364(2) of the Act which provides that "every person who in any return ... required by or for the purposes of this Act makes or authorises the making of a statement false or misleading in any material particular knowing it to be false or misleading ... shall be guilty of an offence".

(8) Alleged Breach of Natural Justice by the Opposing Parties

Since no reasons whatsoever were given to the petitioners at the second EGM to remove them as well as the opposing shareholders as directors, it was submitted that the only logical inference was that the removal of the petitioners was due to the petitioners querying the accounts of the respondent.

The Respondent's Case

(1) Hybrid Petition

The respondent argues that s 218(1) of the Act enables a winding-up order to be made if the Court is of the opinion that it is just and equitable that the company should be wound-up whereas s 181 of the Act allows a member of a company to apply to the Court for a winding-up order on the grounds of oppression. The respondent argues that since in the present case the is petitioners have not made out under which section of the Act they are proceeding, and had referred to both situations therefore the petitioners ought to have presented two petitions. The respondent relied on *Lai Kim Loi v Dato' Lai Fook Kim & Anor* [1989] 2 MLJ 290 and argued that the present case too was a hybrid petition purporting to have been presented under two different sections of the Act and thus ought to be dismissed. Mr. Sidhu also referred to *Kumagai-Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789 where Anuar J (as his Lordship then was) held at page 796:

> These are two petitions under the Companies Act 1965 (which for convenience, I will, throughout this judgment, refer to as 'the Act'). Petition No D3-26-13-91 has been failed under s 181 of the Act and Petition No D6-28-84-92 has been filed under s 218 of the Act. For brevity's sake, I will refer to each of them as the oppression petition and the winding-up petition, respectively.
>
> In order to appreciate the dispute in this case, it is necessary to identify the parties involved.
>
> In the oppression petition, Kumagai-Gumi Co Ltd is the petitioner and the respondents are Zenecon-Kumagai Sdn Bhd, Zenecon Sdn Bhd, Low Hua Kin @ Loo Wah Kim, Cheah Woon Kwong, Loo Hoi Kin @ Liew Hoe Kin and Yu Hee Ming.
>
> In the winding-up petition, the petitioner is Kumagai-Gumi Co Ltd and the company sought to be wound up is the first respondent in the oppression petition. For convenience, I will, throughout this judgment, be referring to Kumagai-Gumi Co Ltd as 'the petitioner' and Zenecon-Kumagai Sdn Bhd as 'the company', in reference to both petitions. Reference to other respondents will be in the order in which they appear in the oppression petition.

Hence it was submitted that the hybrid petition ought to be dismissed.

(2) Delay

The next issue taken by the respondent was that the petition for winding-up had been presented after inordinate delay and that the petitioners had acquiesced in the conduct complained about and reliance was placed on *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326. Relating the facts the respondent contended that since the agreement was dated 29 December 1988 and since the petition was filed only on 6 January 1995, consequently there was a delay of six years and that therefore the petitioners are deemed to have acquiesced in the conduct complained of.

(3) Allegation of Collateral Motive Behind the Petition

The respondent also submitted that the real purpose of the petitioners in presenting the said petition was that they can then obtain payment of money from the respondent and that a further purpose was to teach the past and present directors of the respondent a lesson. The respondent relied heavily on *Re Sin Lee Sang Sawmill Sdn Bhd* [1990] 1 MLJ 250 and quoted extensively from Abdul Malek J (as his Lordship then was) who in turn had quoted from *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227:

> The grant of winding-up was in the discretion of the Court. In exercising this discretion the Court would have in mind the character of the remedy, if sought to be applied to a company which was a going concern; it would take into account, *inter alia*, the gravity of the case made out under s 181(1) of the Companies Act 1965; the possibility of remedying the complaints proved in other ways than by winding the company up; the interest of the applicant in the company; and the interests of other members of the company not involved in the proceedings. In this case the respondent had failed completely to make out a case for winding up the company.

In the event, I came to the conclusion that this was not a case where the Court could form the opinion that it would be just and equitable for the company to be wound up. On this point, I would make reference to *Re Senson Auto Supplies Sdn Bhd* ([1988] 1 MLJ 316) where the headnote reads:

> The words 'just and equitable' in s 218(1)(i) of the Companies Act enable the Court to subject the exercise of legal rights to equitable considerations, that is to say, considerations of a personal character arising from one individual and another which may render it unjust or inequitable to insist on legal rights or to exercise them in a particular way. Even if the directors or majority shareholders have been guilty of improper or unreasonable conduct so that there appears to be a *prima facie* case for relief, it will be refused if the real purpose of the petitioners is to obtain payment of a money owed by the company. It is settled law that delay by petitioners in initiating proceedings after they have realized that they have been victims of a scheme of oppression will induce the Court to refuse relief, since this indicates that they have acquiesced in the conduct complained about and their complaints are not therefore made in good faith. In the present case there was inordinate delay in the presentation of the petition sufficient to debar the petitioners from relief by way of an order for winding up. The Court was not satisfied that the charges of oppression or discrimination

were made out and neither was it satisfied that it would be just and equitable to wind up the company.

These findings are also relevant to our case except the real purpose of the petitioners here, to my mind, was just to teach the respondents a lesson.

I had accordingly dismissed the petition with costs... .

(4) Petitioners' Failure to Take up the Offer of Rights Issue

The respondent argue that at the second EGM where the petitioners were present, two resolutions were passed. One to increase the authorised capital of the company from RM1 million to RM5 million by the creation of 4,000,000 ordinary shares of RM1 each, and secondly that clause 5 of the memorandum of association be amended accordingly, and thirdly that 2,500,000 new ordinary shares of RM1 per ordinary share be offered as rights issue and that the petitioners failed to take up any shares in the rights issue. As for the removal of the petitioners as directors this was done pursuant to Article 69 and the increase in capital in accordance with clause 38 of the memorandum of association. It was the contention of the respondent that the petitioners were never given any express assurance that their participation in the management and their appointment as directors would not be determined.

With regard to the petitioners' contention that they had been oppressed, the respondent relied on *Kumagai-Gumi (supra)* and submitted that the petitioners must identify and prove oppression, and that the mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions with which the petitioners do not agree, is not enough.

(5) Plea of Res Judicata

The petitioners had earlier filed a civil suit and the intitulement was as follows:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN PERDAGANGAN) GUAMAN NO: Dl-22-26-94

ANTARA

WONG LAN	PLAINTIFF
NG KAH HUAT	PLAINTIFF

DAN

EMAS-JAYA ENTERPRISE SDN. BHD.	
LIM GUAT YEANG	
LIM SUE BENG	
LIM BEE LING	DEFENDAN
LIM TEIK MEI	DEFENDAN

and the prayers sought were as follows:

(1) damages to be assessed by this Honourable Court;

(2) an order that the First Defendant whether by their directors or agents or servants howsoever and in any manner or form be restrained from holding the Extraordinary General Meeting purportedly scheduled to be held on the 15.01.94 and/or any other meeting to deliberate on the matters or any -of the matters contained in the Notice dated the 07.12.93 purportedly convening the said Extraordinary General Meeting, that is to say acting or purporting to act or continuing to act in pursuance of the aforesaid Notice until further order;

(3) an order that the Second Defendant be restrained from acting or holding herself out as the Secretary of the First Defendant and from otherwise intermeddling in the First Defendant's business or management of their affairs,

(4) an order that the Second Defendant forthwith do and concur in doing all acts and things necessary to enable the First Defendant to obtain possession of and control over its books documents cash and other property;

(5) a declaration that the Notice dated the 07.12.93 is invalid, null and void;

(6) an order that all an order that all necessary accounts and enquiries may be taken and made for ascertaining the assets of the First Defendant;

(7) an order that costs be in the cause; and

(8) any further or other relief as may be just.

The respondent contends that the *ex parte* injunction applied for and obtained against the defendants in the said civil suit lapsed and no permanent injunction was granted. Subsequently the said civil suit was discontinued and the order of Court dated 24.11.94 read as follows:

PERINTAH

ATAS PERMOHONAN Plaintif-Plaintif bernama di atas DAN SETELAH MEMBACA Saman Dalam Kamar bertarikh 25 haribulan Oktober, 1994, Afidavit Bersama Wong Lan yang diikrarkan pada 24 haribulan Oktober, 1994 dan Ng Kah Huat yang diikrarkan pada 20 haribulan Oktober, 1994 dan Afidavit Jawapan B.S. Sidhu yang diikrarkan pada 22 haribulan November, 1994 DAN SETELAH MENDENGAR Cik Leong Min Yin Peguam bagi Plaintif-Plaintif dan Encik B.S. Sidhu Peguam bagi Defendan-Defendan ADALAH DIPERINTAHKAN bahawa Plaintif-Plaintif diberi kebenaran untuk memberhentikan keseluruhan tindakan ini terhadap Defendan-Defendan dengan kos di antara parti dan parti untuk ditaksirkan dan dibayar oleh Plaintif-Plaintif kepada Defendan-Defendan DAN ADALAH JUGA DIPERINTAHKAN bahawa Plaintif-Plaintif tiada kebebasan untuk memfailkan semula berkenaan dengan perkara yang sama terhadap Defendan-Defendan.

Bertarikh pada 24 haribulan November, 1994.

The prayers sought in this petition are as follows:

(1) that the Company, EMAS-JAYA ENTERPRISE SDN. BHD., be wound up by this Honourable Court under the provisions of the Companies Act, 1965;

(2) that Messrs S.M. Loh, Bala & Co., Public Accountants, of No: 14B, 2nd Floor, Jalan Scott, Off Jalan Tun Sambanthan, 50470 Kuala Lumpur be appointed as the liquidator of the Company.

(3) that the costs of and incidental to these proceedings be that of Your Petitioners and such costs to be taxed by a proper officer of the Court and be paid out of the assets of the Company; and

(4) such other order or orders be made in the premises as this Honourable Court may deem just.

The respondent thus argues that the petitioners herein were given no liberty to file a petition with regard to the same subject matter against the defendant and therefore the present petitioners are estopped from raising all the allegations in the present petition which allegations had already been raised in the earlier civil suit.

The respondent prayed that the said petition be dismissed with costs. It was further prayed for by the respondent that since the petitioners were the real oppressors a compulsory purchase order in respect of the petitioners' shares be made, since the petitioners were the cause of the breakdown in the corporate relationship between the parties.

Court's Findings

Although the respondent had not clearly defined the term "hybrid" it is apparent to me that the objection taken is that the petitioners have based their case under both ss 181 and 218 of the Act in the same petition. With respect, Mr. Sidhu's reliance on *Lai Kim Loi* is totally misconceived. The petition therein had prayed for, *inter alia*, an order:

(iv) that Lai Fook Kim Estate Sendirian Berhad may be wound up by the Court under s 181 or 218 of the Companies Act 1965;

On this premise the then Supreme Court observed that the petition had been presented under two different sections of the Act. The Supreme Court further observed that although the petition was presented under two different sections, the procedure and requirements under the Companies (Winding-Up) Rules 1972 (which was only applicable for a winding-up order under s 218 of the Act) has been followed and that the provisions of O 88 r 7 of the Rules of the High Court 1980 (RHC) (as required for a section 181 petition) had not been complied with. The Supreme Court also stated at page 295:

> In the present case it is to be observed that the petition was in fact assigned a distinctive number by the Registrar of the Court, ie Companies Winding Up No: 6 of 1985, and the petitioner had proceeded to advertise the petition in accordance with r 24 of the Companies (Winding-Up) Rules 1972, which does not require the prior order of the Court.

In the circumstances the Supreme Court held that the petition presented was not in accordance with the provisions of the Act itself, resulting in a petition which was imprecise and which appeared to be a hybrid petition purporting to have been different sections of the Act.

The present case before me has also been assigned a distinctive number, ie Companies (Winding-Up) No: D5-28-10-95 and the petitioners had advertised the petition in accordance with the provisions of r 24 of the Companies (Winding-Up) Rules 1972 and on 7 October 1995 the learned SAR had endorsed the certificate (Encl. 20) pursuant to r 32. In the circumstances although this petition does not specify under which section of the Act it is presented the procedure which has been followed from the very beginning is strictly under the Companies (Winding-Up) Rules 1972 and there is no doubt in my mind that the said petition is grounded on s 218 and not s 181 of the Act. I further hold that in my view it is not a mandatory requirement to spell out the specific section under which the petition is presented. I am further fortified in this view on the basis that neither r 8(1) of the Companies (Winding-Up) Rules 1972 nor Form 2, ie the format of the petition in the Companies (Winding-Up) Rules 1972, requires the petitioner to state categorically under which specific provision of the Act the said petition is being presented.

Moreover if by the use of the phrase "the affairs of the respondent are being conducted or the powers of the other directors and majority shareholders are being exercised' in a manner oppressive to your petitioners", in para 55 of the petition and used only once, it is to be interpreted that the petition is grounded under s 181 as contended by the respondent, I am of the view that the various complaints directed against the opposing parties show that the said opposing parties in their capacity as directors of the respondent have acted in the affairs of the respondent in their own interest rather than in the interest of the members as a whole or in a manner which is unfair or unjust to the petitioners (s 218(1)(f) of the Act) and such conduct itself is conduct oppressive to the petitioners. I am further fortified in adopting this approach upon relying on *Kumagai-Gumi* where Anuar J (as his Lordship then was) said at page 811:

> ... It follows that if one or more of the shareholders insist on the enforcement of strict legal rights provided for by the corporate documents, whether these be the memorandum and articles of association, or some other document in addition to those, such as a written agreement between the shareholders, the Court, whether in exercise of its jurisdiction under the just and equitable ground

> provided in s 218 or under s 181, is entitled to superimpose equitable obligations on those who insist on strict legal rights. Regard has to be had to the relationship between the parties and to all the circumstances of the case to see whether what is being done is fair, reasonable and just. In my judgment, much of the phraseology used in this context by the decided cases is nothing more than a matter of semantics.

His Lordship went on to say at the same page:

> In my judgment, where oppression is alleged, then, whether it be a case heard on s 181 or on the just and equitable provision, the considerations are more or less the same. Of course, the principles applicable are subject to the important qualifications set out in *Re Kong Thai Sawmill (Miri) Sdn Bhd* ([1978] 2 MLJ 227). The Court must, in either case, consider the background and all the circumstances of the case, including the relationship between the parties and their conduct towards each other when coming to a decision.

In *Ganeswary d/o Ponnudurai v Prismatic Sdn Bhd* [1994] 4 CLJ 671, it was argued on behalf of the respondent that the prayers sought in the petition were outside the ambit of s 218 of the Act because the only order that the Court could grant under that section was for the winding-up of the company. The petitioner in claiming that the acts of the directors of the company were aggressive to her which was in the nature of a personal complaint, had brought the petition within the ambits of s 181 of the Act. It was therefore argued that it was a hybrid petition purporting to be presented under two different sections of the Act which could not be done based on *Lai Kim Loi.* On this question, T Selventhiranathan JC (as he then was) said at page 679:

> In my view, the petition in the present case was not a hybrid petition. Although the various complaints directed against Dr. Ramachandran and the other directors of the company could constitute oppressive behaviour within the meaning of s 181(1)(a) of the Act, the complaints *prima facie* showed that Dr. Ramachandran and the other directors had acted in the affairs of the Company in their own interests rather than in the interests of the members as a whole, or that their actions appeared to be unfair or unjust to the petitioner as another member of the company.

In the circumstances I hold that the use of the words oppressive behaviour in this petition cannot be a basis for the respondent to seek to label this petition as a hybrid petition. The facts supporting a 181 petition can be relied upon to support a 218 petition.

As to the issue of inordinate delay in presenting the petition it is my view that what amounts to an inordinate delay is a question of fact having regard to the circumstances relating to each petition. Time itself is not the sole criterion to determine whether the delay is inordinate or not. It is a fact that the earlier Civil Suit D1-22-26-94 was discontinued by an order of Court dated 24 November 1994 and that this petition was filed on 6 January 1995. The petitioners explained that it was common knowledge to all involved in company

matters that from mid-1994, the ROC was in the process of shifting from their previous office in Bangunan Kuwasa in Jalan Raja Laut to Putra Place in Jalan Putra and that the public could not conduct searches and obtain copies of documents immediately.

In any event I find that the filing of the petition within one and a half months from the date of withdrawal of the civil suit cannot by any stretch of the imagination constitute inordinate delay.

The respondent contends that the petitioners had acquiesced in the conduct complained of and relied on *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 290. In that case it was a finding of fact by the learned Judge that from the beginning the petitioners knew that the respondent company was purchasing goods from Bagan Auto owned by one of the respondent's directors. The learned Judge said at page 329:

> ... the petitioners had been well aware of the practice and did not appear to have taken any exception to it until they commenced the present proceedings.

Further in answer to the petitioners' complaint that the respondent company invested in a tontine business carried on by Textson Agency & Trading Co., which was an illegal activity, the learned Judge found as a matter of fact that the petitioners failed to take any steps to complain about investment in the tontine business until those proceedings were commenced. In my view these are clear evidence of acquiescence on their part. However in the present case, after the JVA was signed in 1988 to develop the project I find that the petitioners were excluded from active management of the respondent and only in 1993 were the petitioners given the unaudited accounts of the respondent. Further, when in 1994 the petitioners made further enquiries with the opposing shareholders, the opposing shareholders convened an EGM to remove the petitioners as directors and informed the Court that the first EGM was postponed indefinitely. Subsequently a second EGM was convened and the petitioners were indeed removed as directors. I find that only in April 1994 upon enquiries made by the solicitors for the petitioners did the solicitors for the opposing shareholders and the respondent inform the petitioners that the respondent had much earlier purchased the land from LKNP for the said project but however failed to inform the petitioners the date of the purchase and the source of funds from which the purchase was financed. Neither were the petitioners informed that the said JVA had been converted into a sale and purchase agreement. I therefore hold that the conduct of the petitioners was in no way to be construed as acquiescence. In my view the petitioners had allowed the opposing shareholders to manage the respondent as they were holding 60% of the equity of the respondent and the petitioners had been made to believe by the conduct of the opposing parties that the respondent would not deviate from the 1988 agreement.

As to the respondent's allegation of collateral motives behind the presentation of the petition I find no truth in this at all. There is no evidence to show that the petitioners had, even at any time, demanded any money from the respondent or from any one of the opposing parties. As to the contention that the presentation of the petition was an attempt to teach the past and present directors of the respondent a lesson I am unable, in the absence of clear reference to any particular lesson that had to be taught, to even consider this submission.

With regard to the respondent's contention that the petitioners having failed to take up the offer of the rights issue, cannot now complain in respect of their removal as directors, it is totally inconceivable to expect the petitioners to venture further when already they were groping in the dark. The respondent had not even supplied the petitioners with audited accounts, yet they were expected to make an immediate decision whether to take up the rights issue or not. The opposing parties had categorically admitted that the primary purpose of the JVA was to develop the said project and that the change of directors and shareholders of the respondent was done in furtherance of the said purpose. Therefore they ought to have known that without perusing the audited accounts the petitioners would not venture to purchase the rights issue. To my mind the conduct of the opposing parties was a clear act of connivance to thwart the legitimate rights of the petitioners in participating fully and effectively in the affairs of the respondent. The respondent's argument that the resolution to increase the share capital of the respondent was passed *bona fide* for the benefit of the respondent as a whole and the respondent's reliance on *Sidebottom v Kershaw, Leese & Company, Limited CA* [1920] 1 Ch 154 in support, are views which I hold as totally misconceived. It is therefore necessary for me to look into the facts of *Sidebottom*.

In that case a private trading company, in which the majority of the shares were held by the directors, passed a special resolution to alter its articles by introducing a power for the directors to require any shareholder who competed with the company's business to transfer his shares, at their full value, to nominees of the directors. The plaintiffs, who carried on a competing business, held the minority of the shares, and had voted against the resolution. They brought an action for a declaration that it was invalid as against them. It was held, *inter alia*, that the company had power under s 13 of the Companies (Consolidation) Act, 1908, to introduce into its altered articles anything that might have been included in its original articles, provided that the alteration was made *bona fide* for the benefit of the company as a whole. A power to expel a shareholder by buying him out was valid in the case of original articles, and could therefore be included in altered articles, subject to the same limitations.

But in the case before me and with reference to the affidavits of the opposing parties, I find no reason whatsoever being given to the petitioners for the

increase of the share capital of the respondent, and in any event there was certainly no question of the petitioners competing with respondent's business.

The respondent relies heavily on *Kumagai-Gumi* wherein it was held that a fully paid shareholder, in petitioning for a compulsory winding-up, must show, on the face of the petition, a *prima facie* probability that there would be assets available for distribution amongst the shareholders and that this rule was not affected by s 221 of the Act.

Section 221(1) reads as follows:

> (1) On hearing a winding-up petition the Court may dismiss it with or without costs or adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit, but the Court shall not refuse to make winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets, or the in the case of a petition by contribution that there will no assets available for distribution amongst the contributories.

The winding-up petition in *Kumagai-Gumi* is based three grounds:

(1) inability to pay debts and consequent insolvency;

(2) that the directors have acted in their own interest under s 218(1)(f); and

(3) just and equitable ground

In the present case I find that the petitioners are not asking for a debt to be paid by the respondent nor are they alleging that the respondent is unable to pay its debts and is thereby insolvent. The grounds of this petition are distinctly different from the facts of the *Kumagai-Gumi.* The respondent's reliance on the *Kumagai-Gumi* in support of its case is as misconceived as its earlier reliance on the *Sidebottom* case.

Finally I consider the respondent's plea of *res judicata.* I have earlier narrated the prayers in respect of both the Civil Suit D1-22-26-94 and the prayers sought in this petition. It is clear that the subject matter of the civil suit as enumerated earlier is totally different from the reliefs sought in the petition herein in that the latter merely seeks to wind up the respondent and that a liquidator be appointed thereto.

The principle of *res judicata* was recently considered by the Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 SC which held that when a matter between two parties had been adjudicated by a Court of competent jurisdiction they and their privies are not permitted to litigate once more the *res judicata,* as the judgment becomes the truth between such parties. An *estoppel per rem judicatum* has been created as a result. There are two kinds of *estoppel per rem judicatum,* ie cause of action estoppel and issue estoppel. The cause of action estoppel prevents reassertion of a cause of action which has been determined in a final

judgment by the same parties. On the other hand, the issue estoppel prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. Further the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently. Unlike an ordinary estoppel which should not be pleaded, the Court had an inherent jurisdiction to dismiss the action by applying the doctrine of *res judicata* which is an estoppel based on public policy, even if it has not been pleaded, as public policy requires that there should be finality to litigation. In my view there was no adjudication of the matter in question at all, since the order of the Court dated 24 November 1994 was for the civil suit to be discontinued. In any event the issues were dissimilar. The claim to *res judicata* was totally misconceived and devoid of merit.

If at all, the respondent ought to have argued on the basis of estoppel. Although no submission was directed on the issue of estoppel, however in the light of the decision of *Mensa Mercantile (Far East) Pte Ltd v Eikobina (M) Sdn Bhd* [1991] 2 MLJ 258 which held that for the doctrine of issue estoppel to apply there must also be privity of interest between the defendant in the first action and the defendants in this action and in the light of the decision in *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119, 113 SC which held that in order for the doctrine of *res judicata*, cause of action estoppel or issue estoppel to apply, the earlier proceedings must have resulted in a final judgment or decree, it is proper that I consider estoppel in the event that I am wrong in the view that I hold that estoppel has to be pleaded distinctly as opposed to *res judicata*. The order dated 24 November 1994 ends with a *caveat* as follows:

> Bahawa Plaintif-Plaintif tiada kebebasan untuk memfailkan semula berkenaan dengan perkara yang sama terhadap defendan-defendan.

In *Lee Suat Hong v Teo Lye* [1988] 2 MLJ 537 CA the Singapore Court of Appeal asserted that an estoppel arises where one party (A) makes a representation or promise to an other (B) intending (B) to act in reliance on the representations or promise, and (B) does so act to his detriment. (A) will then be estopped from acting inconsistently with his representation or promise. Even assuming that the promise of the plaintiff of the *caveat* mentioned earlier in the civil suit had induced the defendants therein to agree to the withdrawal of the suit, can a party be precluded from filing afresh or could that party be estopped if the same defendants continue to breach the law. There is no evidence that the respondent had to date filed the annual returns pursuant to s 165 of the Act which provides for a punitive subsection (7). There is also no evidence to date of the respondent having complied with s 167 of the Act which deals with the keeping of proper accounts and which section also provides for a punitive subsection (7). In the light of these blatant and flagrant breaches, can the respondent continue to muzzle the petitioners with the gag

of estoppel. In my view the bar to refile prayer 6 of the civil suit, ie to take accounts, is against public policy. A wrong done cannot be allowed to be perpetuated in the name of equity. Equity was created to remedy the strictures of the law and therefore, as in this case, to allow the respondent to ignore the strict requirements of the Act with impunity on the comfortable repose that it could waive this order of 24 November 1994 with its *caveat* against the petitioners could be clear injustice and against public policy. The plea of *res judicata* and *estoppel* therefore ought to fail.

In the circumstances, I allowed the petitioners' prayers as follows:

(1) that the respondent be wound up under the provisions of the Companies Act 1965;

(2) that Messrs S.M. Loh, Bala & Co., Public Accountants, of No: 14B, 2nd Floor, Jalan Scott, Off Jalan Tun Sambanthan, 50470 Kuala Lumpur, be appointed as the liquidator of the company; and

(3) that the costs of and incidental to these proceedings be taxed by a proper officer of the Court and be paid out of the assets of the company.

After I had given my decision in open Court on 11 March 1996, the respondent filed a Notice of Motion for a stay of execution of my order dated 11 March 1996 and for a stay of the winding-up proceedings pending the outcome of the appeal by the respondent to the Court of Appeal and for the costs of the motion to be costs in the cause. The said Motion was supported by a joint affidavit of four directors of the respondent. They merely averred that they had instructed their solicitors to appeal against my decision on points of law and/or on the affidavit evidence adduced in Court by the respondent. They also contended that they had merits and that the respondent was a going concern. They averred that I had ample jurisdiction to grant an order for stay of execution which would have "the effect of preserving the integrity of any appeal pending before the Court of Appeal". It was their averment that there was no need for them to demonstrate any special circumstances to warrant a stay of proceedings or of execution. They submitted that the paramount consideration governing an application for a stay of execution or proceedings under s 44(1) of the Courts of Judicature Act 1964 is that the appeal, if successful, should not be rendered nugatory. They contended that this case involved issues of law under the provisions of s 181 and 218(1) of the Act and that these questions of law were of great public importance. They also submitted that pursuant to s 73 of the Courts of Judicature Act 1964 and r 13 of the Rules of the Court of Appeal 1994 I had the judicial discretion to grant a stay which "must be exercised within the confines of the law". Finally they contended that the petitioners would not suffer any prejudice if the stay was granted. The respondent, by way of its written submission, whilst conceding that s 221 of the Act only allows the Court to make an order to the company or to dismiss the petition, nevertheless maintained the view that a stay ought to be granted.

As to the issue raised by the petitioners that there is no provision in the law which allowed for a stay of execution of an order of Court to wind up a company, the respondent relied on s 73 of the Courts of Judicature Act 1964 and r 13 of the Rules of the Court of Appeal 1994 and submitted that these two provisions give this Court a leeway to exercise its judicial discretion within the confines of the law.

The petitioners also filed a joint affidavit in reply and pointed out that there were no provisions in law which allowed a stay of execution of a Court order winding-up a company and appointing a liquidator. They also affirmed that since no leave to appeal to the Court of Appeal has yet been obtained, there was therefore currently no appeal and that therefore the said motion was indeed premature. As to the issue that there were merits, it was averred that none was shown to exist. The petitioners contended that the respondent had not demonstrated any reason or made out any positive or sufficient case to warrant the exercise of discretion by this Court in its favour.

In so far as stay of execution or stay of proceedings is concerned, I am faced with two recent decisions of both the appellate Courts of this country. I shall first consider the Court of Appeal decision in *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 CA. The appellants presented a petition to wind up the first respondent company of which they were shareholders. Before the petition was heard, the 2nd, 3rd and 4th respondents took out a Motion to strike out a prayer in the winding-up petition which was that there be a distribution in species of shares and investments, on the ground that it was obvious that the relief claimed therein could not be granted by the Court at the hearing of a winding-up petition. The Motion was granted and the said prayer was struck out. The appellants appealed against this order. In the meantime, the Court had fixed the hearing of the petition. The appellants, fearing that if the petition was heard before their appeal, they would suffer prejudice applied to the Court of Appeal for a stay of all proceedings on the petition pending the hearing and disposal of the appeal.

It must be borne in mind that this case dealt with a proceeding before the hearing of the winding-up petition. The appellants' argument that by virtue of s 221(1) of the Act they could apply for the prayer that the assets of the company be distributed in specie among the shareholders was put paid to by the Court of Appeal.

Section 221(1) reads:

> (1) On hearing a winding-up petition the Court may dismiss it with or without costs or adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit, but the Court shall not refuse to make winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets, or in the case of a petition by a contributory that there will be no assets available for distribution amongst the contributories.

The appellants' view that the words, "make any interim or other order that it thinks fit" in s 221(1) of the Act, could provide them with the right to obtain an order in terms of the prayer was succinctly disposed off by Gopal Sri Ram JCA in his judgment laced with his usual flair of the language when he held that despite the rather wide words appearing in s 221(1), the only final order a companies Court may make is either to direct a winding-up or to dismiss the petition. It may make interim orders, eg by appointing a provisional liquidator or a receiver and manager pending the final disposal of the petition, but it may not make an order as to the distribution or disposal of the assets of a company. He further went on to hold that the power of the Court of Appeal to grant a stay of proceedings or stay of execution is found in s 44 of the Courts of Judicature Act 1964 ('the CJA"). This provision conferred ample jurisdiction upon the Court to grant any order that will have the effect of preserving the integrity of any appeal pending before it. But whether such an order ought to be granted was entirely within the discretion of the Court. However, there was no need for the applicant to demonstrate special circumstances to warrant a stay of proceedings or of execution. The paramount consideration governing an application for a stay of execution or proceedings or an application for some other interim preservation order of an appeal under s 44(1) of the CJA, was that the appeal, if successful, should not be rendered nugatory. If upon balancing all the relevant factors, it was clear that an appeal would be rendered nugatory without the grant of a stay or the interim preservation order, a stay or other appropriate interim relief should normally be directed. However, in a case where the pending appeal was obviously unarguable, it would not be a proper exercise of discretion for the Court to grant a stay.

Since *See Teow Guan* dealt with a Motion in respect of s 221 of the Act, the question arose whether the law as propounded by the Court of Appeal in respect of stay of proceedings or stay of execution would equally apply to a case where an order for winding-up had already been made.

In this respect s 243 of the Act reads as follows:

> 243. Power to stay winding-up.
>
> (1) At any time after an order for winding-up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.
>
> (2) On any such application the Court may, before making an order, require the liquidator to furnish a report with respect to any facts or matters which are in his opinion relevant.

I shall deal with the provisions of this section subsequently. In the meantime, the Federal Court had occasion to deal with an application for stay pursuant to s 243 of the Act in *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ FC 709. The facts were as follows:

The appellant and the first to the fourth respondents were shareholders of Nadchatiram Realities (1960) Sdn Bhd (the company). As a result of non-payment of income tax a winding-up order was made against the company by the Inland Revenue Department. After the company was wound up by the Court several actions we commenced in the High Court by family members of the company against one another pertaining to the company assets. The four respondents filed a Notice of Motion seeking, *inter alia*, that the winding-up order discharged and all proceedings in relation to the winding-up be stayed under s 243 of the Act. The application was supported by the liquidator who confirm that the company was solvent and that the creditors would be paid in full. The Judge having allowed the Motion, the appellants appealed, *inter alia*, that the Judge had misdirected himself by failing to consider and apply the correct principle governing a stay under s 243 of the Act.

In a clear-cut visional decision his Lordship Mohd Dzaiddin FCJ said at pp 716-717:

> The principles which govern the Court in the exercise of its jurisdiction whether to grant or refuse a stay have been established in the following cases. In the leading case of *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174, Buckley J was dealing with an application under s 89 of the English Companies Act 1862, which is similar to our s 243, which provided that the Court may at any time after a winding-up order, upon the application of any creditors or contributory and 'upon proof to the satisfaction of the Court that all proceedings in relation to such winding-up ought to be stayed', make an order staying the same. What then should be the material considerations to induce the Court to order a stay? According to Buckley J (taken from the headnote which summarized the text of his decision) [1903] 2 Ch 174 at p 174:
>
> > In the exercise of its jurisdiction with reference to staying proceedings under an order for the winding-up of a company, the Court should, so far as possible, act upon the principles which are applicable in exercising jurisdiction to rescind a receiving order or annul an adjudication in bankruptcy against an individual – in which cases the Court refuses to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether the rescission or annulment will be conducive or detrimental to commercial morality and to the interests of the public at large.
> >
> > In refusing or postponing a stay of winding-up proceedings the Court will have regard to the following facts:

(a) That directors have not complied with their statutory duties as to giving information to the Official Receiver or furnishing a statement as to the affairs of the company.

(b) That there has been an undisclosed agreement between the promoter and the vendor to the company as to the participation by the former in fully paid shares forming the consideration for the purchase of property by the company on its formation.

(c) That the promoter has made gifts of fully paid shares to the directors.

(d) That there are any other matters connected with the promotion, formation, or failure of the company, or the conduct of its business or affairs, which appear to the Court to require investigation.

We pause here to state that we respectfully accept the above principles laid down by Buckley J and would apply them in dealing with the present appeal.

In other words it is a prerequisite to a grant of a stay pursuant to s 243 of the Act that:

(1) the application for stay is to be by a liquidator or a creditor or a contributory;

(2) there be proof to the satisfaction of the Court that all proceedings in relation to such winding-up ought to be stayed.

In addition to the above-mentioned prerequisites and since the Federal Court had accepted the four facts which Buckley J had laid down, which ought to be considered, it would seem that notwithstanding the fact that the Federal Court did not consider s 44(1) and/or s 73 of the Courts of Judicature Act 1964 and/or r 13 of the Rules of the Court of Appeal 1994, in so far as a stay of proceedings or execution in relation to s 243 of the Act is concerned, the relevant and pertinent section is s 243 of the Act itself. Section 44(1) of the Courts of Judicature Act 1964 reads as follows:

44.(1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.

Pursuant to s 43 of the same Act whenever any application may be made either to the High Court or to the Court of Appeal it shall be made in the first instance to the High Court. It is apparent that s 44(1) of the Courts of Judicature Act allows for or an application for an interim order, that is, a stay to prevent prejudice pending the hearing of the appeal to be made. In other words it gives an avenue generally, in all cases for such an application to be made. This section ought to be read together with s 73 of the Courts of Judicature Act which reads:

> 73. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the Court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

Rule 13 of the Rules of the Courts of Appeal 1994 is *in pari materia* to s 73 of the Courts of Judicature Act.

It is to my mind clear that unless the Court below or the Court of Appeal **so orders** (Emphasis provided) an appeal shall not operate as a stay, and as to what should form the basis for the Court to rely on, to make such an order the Federal Court's significant reliance on the decision of the Supreme Court of Victoria in *Krextile Holdings Pty Ltd v Widdows* [1974] VR 689 is noteworthy. It quoted and adopted in the judgment of Gillard J at page 694:

> It is not merely necessary for the applicant to establish that a stay is reasonable in the circumstances. He must satisfy the Court it ought to grant a stay. As was emphasised by Buckley J in *Re Telescriptor Syndicate Ltd* [1903] 3 Ch 174 at p 182:
>
> > I decline to order a stay of these proceedings until it is proved to my satisfaction that the winding-up ought to be stayed. That will not be proved to my satisfaction until it is shown to me that all the facts are as I hope they are – that the trading operations of this company have been fair and aboveboard.

The Federal Court being the highest law-making body in the land, and having considered the relevant cases relating to an application for stay, distilled for our benefit the essence of learned judgments and summarised the principles which emerged from the said authorities as follows:

> (1) The granting of a stay under s 243 of the Act is discretionary and the *onus* is on the party seeking a stay to make out a positive or sufficient case.
>
> (2) The attitude of the creditors, contributories and the liquidator is a relevant consideration.
>
> (3) That in exercising its discretion, the Court will consider not only the interest of the creditors but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large.
>
> (4) Last, and which by no means least, is that a stay will be refused if there is evidence of misfeasance or irregularities demanding investigation.

The Federal Court hastened to add that the above considerations were not meant to be exhaustive.

I shall now relate the above-mentioned considerations to the present case, in particular clause no: 4. Since I have found for the petitioners on the grounds which are substantially based on violation and contravention of the various

provisions of the Act, the articles of association of the respondent, various incidences of prejudicial, unfair and unjust acts against the interest of the petitioners by the respondent, I am of the view that there is a clear breach of consideration no: 4, in that, since there is evidence of misfeasance or irregularities demanding investigation, I ought to refuse a stay.

It was submitted that this case was a matter of public interest as it dealt with issues relating to both ss 181 and 218(1) of the Act. I have already dealt with these issues earlier in my judgment and all I need say is that in my view there is nothing of public interest in this case, contrary to what has been alleged by the respondent. The law journals are replete with authorities on both these sections and as has been pointed out earlier, the respondent has raised no new novel issue of public importance.

It is proper at this stage for me to refer to a very recent decision of Abdul Malik J in *All Persons in Occupation of the House (partly wooden and partly cemented) and the Wooden Stores Erected on a Portion of Land held under Grant NO: 16977 for Lot 4271 in the Township of Johor Bahru, Johor v Punca Klasik Sdn Bhd* [1996] 2 AMR 1855, 1860 wherein the learned Judge refused to follow the Court of Appeal's decision in *See Teow Guan* on the basis that the said Court did not refer to two Federal Court decisions, namely *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105 FC and *Kerajaan Malaysia v Dato' Hj Ghani Gilong* [1995] 2 MLJ 119 FC which two authorities entrenched the special circumstances approach whereas the Court of Appeal in *See Teow Guan* considered the approach that an appeal would be rendered nugatory without the grant of a stay.

In the context of this case before me it matters not whether I consider the robust approach of the Court of Appeal or the long-established approach of showing special circumstances as adopted by the Federal Court. On the application of either principle, a stay ought to be refused.

One other ground that militates against the grant of a stay, is, that it had been made even before the liquidator had gone through the books and accounts of the respondent and the Court is therefore without the benefit of any preliminary facts with regard to the affairs of the respondent.

As to whether the respondent is a going concern, no evidence had been adduced in any of the affidavits to show that this was so.

In all the circumstances therefore, I was constrained to exercise my discretion and to dismiss the application for stay with costs, which costs I ordered should follow the event.

Reported by S Puvan